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No. 90-597

Supreme Court, U.S.
FILED
NOV 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

ROBERT and ANA C.,

Petitioners,

vs.

MIGUEL and LOUISE T.

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is New York's Domestic Relations Law Sec. 111(1)(e), which denies parental rights to an unwed father solely on the basis of the father's failure to cohabit with the mother, violative of the Due Process and Equal Protection Clauses of the 14th Amendment to the United States Constitution?

The order sought to be reviewed, relying on decisions of this Court of the past twenty years, answered the question in the affirmative.

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Miguel T. and Louise T., are husband and wife and are the natural parents of a child, Raquel Marie, whose adoption was sought by Petitioners. They respectfully submit this brief in opposition to the Petition for a Writ of Certiorari ("the petition").

IDENTITY OF THE PARTIES

Respondents have been married to each other since November 5, 1988. In addition to the child that is the subject of this case, respondents have an older child, Lauren T., born to them in August of 1986. The adoption proceeding underlying this case commenced on January

3, 1989. At each point in the proceedings below, Respondents were clearly identified as husband and wife (e.g., "Mr. and Mrs. T.", "Miguel T. and Louise T.").[1] In this Court, for reasons that will become apparent below, Petitioners and the Law Guardian have intentionally misidentified respondents as "Miguel T. and Louise *N*".

In addition, the Court of Appeals' decision herein involved not only this case, but the case of "Matter of Baby S.", which presented the identical constitutional issue. See Petitioner's Appendix ("App."), at A-2, A-4, A-19. As will be discussed in the "Argument" portion of this brief (Point II), in determining whether to grant certiorari, this Court must consider also the facts in that case, for they are an integral part of the Court of Appeals' *ratio decidendi*.

JURISDICTION OF THIS COURT

Respondents respectfully submit this Court has no jurisdiction to grant certiorari as the order sought to be

[1] Indeed, prior to the commencement of the hearing in Family Court, Respondent Miguel T. moved for summary judgment dismissing the adoption proceedings on the ground that his marriage to the natural mother prior to the filing of the adoption petition rendered the child "born in wedlock" under New York's Domestic Relations Law Sec. 24(1). As the "legitimate" father of the child, Respondent argued, his consent was absolutely required under Domestic Relations Law Sec. 111(1)(b). This contention was rejected and the case proceeded on the basis of Respondent's status as the natural father of a child born "out of wedlock". Respondent raised the issue in both the Appellate Division and the Court of Appeals, where it was likewise rejected.

reviewed is not "final" within the meaning of Title 28 U.S.C. Sec. 1257. Petitioners' jurisdictional assertions (Pet. at 2-3) contain serious misstatements of both law and fact, thus compelling Respondents to address this issue at length.

Discussion

Petitioners first assert that the Court of Appeals has "construct[ed] an interim state law standard for measuring whether unwed fathers of newborn infants should be afforded an absolute veto over adoptions." Pet. at 2. Next, Petitioners contend that "the factual determination" the Appellate Division is to make as to whether Respondent Miguel T. meets the requirements of the interim "state law" standard is a question of state law. *Ibid.* From these assertions, Petitioners conclude that the "federal issue" has been finally decided by the Court of Appeals' decision and that this petition is the only opportunity they have to raise it before this Court, "whatever the ultimate outcome of the case". Ibid, at 2-3.

Petitioners are plainly wrong. First, the Court of Appeals has not constructed a *state* standard for determining the rights of unwed fathers. Quite to the contrary, the Court pointedly states in its decision that *the standard is the one established by the decisions of this Court* "which define an unwed father's right to a continued parental relationship by his manifestation of parental responsibility." App. at 18. Thus, the Appellate Division's determination as to whether Miguel T. meets that federal constitutional criteria is, *a priori*, a federal question. *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Jackson*

v. Virginia, 443 U.S. 307 (1979); *Miller v. California*, 413 U.S. 15, 25 (1973); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-286 (1964). That being so, the party adversely affected by that determination may continue to assert the federal question. Accordingly, this case does not fall within that narrow class of cases where finality was found under less than final circumstances. See, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-478 (footnote omitted):

> In most, if not all, of the cases [where finality was found in spite of contemplated further proceedings] these additional proceedings would not require the decision of other federal questions that might also require review by this Court at a later date, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and of delayed justice.

Moreover, a decision by this Court now will not end this litigation, for there are several other issues in the case concerning Respondent *Louise T.*'s rights that will be completely unaffected by this Court's action and yet determine the final outcome of the case.[2] Cf. *Cox Broadcasting, supra*, 420 U.S. at 486: "[I]f we now hold that [the state court erroneously ruled on the federal question], this litigation ends."

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[2] Most notable among the unresolved issues is the question of whether Respondent Louise T.'s consent was obtained in conformity with New York law. See the Appellate Division's decision, App. at A-29. A hearing on this and other issues commenced in November 1989, but when the Court of Appeals accepted Respondent Miguel T.'s appeal, it was discontinued and it has been held in abeyance pending a final resolution of Respondent Miguel T.'s rights.

Petitioners also assert that even if they are ultimately successful in the Appellate Division on what they have labeled "state law grounds", the federal issue, as they see it, "will be mooted and Petitioners, as well as adoptive parents similarly situated, the State and other interested persons will be deprived of any opportunity to have the federal issue reviewed here – an extreme hardship given the invalidity of an entire statutory scheme". Pet. at 2-3. This lament is specious for several reasons.

First, Petitioners, as *residents of the State of New Hampshire*, never had, nor do they now have, an interest in New York "statutory schemes" beyond the direct and immediate effect that law may have on the outcome of this case. Indeed, it is quite fanciful for them to assert concern over what they suggest is the "unsettled" state of the law in New York in the face of their initial refusal to submit to the jurisdiction of the New York courts.[3] Since

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[3] As Petitioners note (Pet. at 15), within *days* of discovering that Louise had given his child to Petitioners, Miguel brought on a writ of habeas corpus in New York State Supreme Court. What Petitioners fail to note, however, is that in opposing the writ they challenged the jurisdiction of the New York courts, arguing that since the child was in New Hampshire only the courts of that state could determine its custody. Thus, after the writ was denied on other grounds – the court pointedly rejecting their jurisdictional argument – Petitioners filed their adoption petition in the State of New Hampshire in November of 1988. It was only after that court, in a written communication to Petitioners' New Hampshire counsel, indicated it was dismissing the adoption petition, and only after Respondent Miguel filed a custody petition in New York, that Petitioners finally agreed to submit to New York law.

Petitioners concede at the outset that the Court of Appeals' invalidation of the statute may have no effect on the ultimate disposition of the case, – because they may prevail in any event – they are hardly in a position to claim hardship if this Court declines review.

Secondly, Petitioners assert that "adoptive parents similarly situated" will suffer some deprivation unless this Court acts now. The short answer to that claim is that any deprivation suffered by potential adoptive parents generally does not flow from the Court of Appeals' decision in this case but from the constitutional principles established by this Court during the past twenty years. Moreover, the "deprivation", if such it is, is limited to recognition of, and adherence to, the rights of the fathers as well as of the mothers of the children they wish to adopt. As one commentary recently put it, in describing the effects of the Court of Appeals' decision in this case "It is no longer safe for [adoption] attorney[s] to 'blink' at the unwed father's rights." Carrieri and Meyer, "Avoiding Pitfalls in Private Adoptions", New York Law Journal, November 2, 1990, p. 1, col. 1, p. 4, col. 3.

RESPONDENT'S STATEMENT OF THE CASE

Because of the page limitation applicable to Respondent's briefs, we refrain from setting forth a detailed statement of the facts in this case. Instead, we recite verbatim the findings of fact rendered by the hearing court, which are reproduced in the appendix to the petition at A-32 through A-35. Significantly, those findings

were not disturbed on appeal, either in the Appellate Division or in the Court of Appeals:

"Certain issues of fact have been conceded by all parties:

1. Louise N.T. and Miguel T. are the biological parents of the child Raquel Marie.

2. At the time of the child's birth Louise N. and Miguel T. were not married.

3. The child Raquel Marie was born on May 26, 1988.

4. Louise N. and Miguel T. while unmarried, were the biological parents of a child Lauren born August 10, 1986.

5. Raquel Marie was placed with the adoptive parents Robert and Ana C. on July 22, 1988.

6. Louise N. and Miguel T. were subsequently married on November 4, 1988.

* * *

Miguel T. (hereinafter referred to as Michael T.) testified that he and Louise had an off again/on again relationship for several years. They met in high school and dated during 1984 and 1985. In the Fall of 1985, Louise became pregnant with the child Lauren. During this pregnancy, Louise sometimes lived at his parents' home and at her parents' home. They took Lamaze classes together to prepare for the baby, he drove her to the hospital on her due date and was present during the actual birth of the child. Lauren was born on August 10, 1986. He testified that they discussed marriage but Louise stated she didn't trust him enough to marry him. In her direct testimony, Louise N. confirmed Michael's statements.

In the Spring of 1987, Louise, Michael and Lauren moved into an apartment at 84 Dunwoodie ~~Street in Scarsdale~~, New York. The three lived together until Louise moved out in or about August, 1987. At that point she went to live with her parents and he lived with his parents.

In October, 1987 Louise was complaining of back pains. Michael testified he made arrangements at a clinic called DOCS on Central Avenue, Yonkers, New York for Louise to be examined. He brought her for the examination and paid for same. It was as a result of that examination that they learned Louise was pregnant with the subject child.

Both Louise and Michael testified that in January or February, 1988 Michael made an appointment with Dr. Joan Adams, a gynecologist, to examine Louise and Michael paid for same.

On February 15, 1988 he called St. Agnes Hospital to arrange for a sonogram which was taken on February 18, 1988. Michael testified he paid $165.00 for said test.

In March of 1988, Michael bought a glider for Louise costing $310.00. Louise was complaining of back aches and had told him about this chair that eased her pain.

Because the private gynecologist was too expensive, Michael arranged for Louise to have her prenatal care at the St. Agnes Clinic. The total cost for same was $850.00. Michael testified that in June, 1988 he reimbursed Louise the $850.00 she expended for medical care.

He further testified that after the child was born, he provided formula and diapers and whatever else Louise needed for the child.

* * *

Louise and Michael both learned of the pregnancy in October, 1987. Michael testified that in November, 1987 he, Louise and Lauren had Thanksgiving Dinner with the Licata family. During the dinner he advised his hosts that Louise was pregnant and he was the father. In December, 1987 they had Christmas Dinner with the DeLillo family and advised them of Louise's pregnancy.

In January, 1988 during a criminal proceeding Michael, through counsel, advised the Court that he was the father of Louise's unborn child.

Both testified that after the birth of the child, Louise brought both children (Lauren and Raquel) to baseball games in which Michael was a participant. On each occasion, Michael held the child and advised his friends and teammates that Raquel was his new daughter.

Michael testified that prior to the birth of Raquel, Louise had mentioned placing the child for adoption. He told her he would never agree to same. Furthermore, if she could not handle the children he would take both.

Sometime in June, 1988 Louise had placed the child with the Spence-Chapin Agency. The child was there for some 20 days. On July 12, 1988 Louise had gone to Spence-Chapin to visit the child and was informed the child was not available. Raquel had been brought to a doctor for an examination. After demanding the return of the child, Louise called Michael to come to the agency. Upon his arrival, he too demanded the return of the child. Within a period of time thereafter, Louise, Michael and Raquel left the agency together.

On July 19, 1988, after the birth of Raquel, Michael T. filed a paternity petition and a custody petition in the New Rochelle Family Court on behalf of Raquel wherein he named Louise N. as Respondent.

The Court records indicate that the petitions were personally served on Louise on July 25, 1988, three days after the child was surrendered by Louise. On August, 16, 1988 Louise N. appeared before the Family Court in New Rochelle with Michael T. and his attorney Dominick Porco, Esq., Louise N. waived counsel and bloodtest admitted Michael T. was the father of Raquel, consented to the entry of an order of filiation and requested no support. An order of filiation was entered by the Court on August 19, 1988. The custody petition filed on July 19, 1988 was subsequently withdrawn by Michael T. on January 5, 1989 subsequent to the marriage of the parties which took place on November 4, 1988.

Both Louise and Michael acknowledge that Michael's name does not appear on Raquel's birth certificate. However, both testified that after the birth of the child, Michael visited at the hospital and came at those special times reserved only for fathers so that he could feed Raquel."

SUMMARY OF THE ARGUMENT

The Court of Appeals' decision in this case is entirely consistent with, indeed mandated by, the prior decisions of this Court on the issue of parental rights of unwed

fathers. The decision is in complete conformity with decisions of sister states construing the principles enunciated by this Court.

Because the decision simply brings New York's statutory scheme in line with the mandate of prior decisions of this Court, there is nothing novel about the decision.

REASONS FOR DENYING THE WRIT

I. NONE OF THE CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI IS APPLICABLE

Certiorari jurisdiction is exercised only when there are "special and important reasons therefor." Sup. Ct. Rule 10.1. None exist in this case.

As the Court of Appeals itself made clear in its decision, the ruling herein was mandated by decisions of this Court over the past twenty years. "Thus, it is plain that within two decades the interest of unwed fathers in a relationship with their children has gained significant recognition in the law, and the dimensions of that interest are by now well defined." App. at A-10. Thus, not only is there no conflict between this decision and prior decisions of this Court, a necessary pre-requisite in certiorari review under Rule 10.1(c), the ruling brings the law of New York into conformity with the constitutional principles enunciated by this Court.

The invalidated statute, Sec. 111(1)(e) contained a provisions that required the natural father to cohabit with the mother for a definite period as a condition precedent

for granting the father parental rights to his child. This requirement appears in the law of only one other state, but only in the disjunctive (see App. at A-17, n.3), and no prior decision of this Court has ever made the relationship between the parents the factor defining the parental rights of the father.

Petitioners would have this Court begin all over again in this area of constitutional law by applying Justice Scalia's analytical approach to novel Due Process claims, as set forth in "Footnote 6" in *Michael H. v. Gerald D.*, ___ U.S. ___, 105 L.Ed.2d 91 (1989). However, the rights of unwed fathers are, as the Court of Appeals noted, "by now well defined" and have been elevated to constitutional stature by the prior decisions of this Court. It is, therefore, too late in the day to apply Justice Scalia's "societal tradition" test to this well-settled area of constitutional law.[4]

But even if the question is posed as Petitioners frame it, by paraphrasing Justice Scalia (Pet. at 25), "whether the relationship between persons in the situation of Miguel and Louise has been treated as a protected family unit under the historic practices of our society", the

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[4] It is ironic, indeed, that before this Court Petitioners place such reliance on *Michael H.*, when, as Respondents in the Court of Appeals, they said this:

> Appellant condemns the Appellate Division for not referring to *Michael H.* Even apart from the fact that the decision does not help him, he neglects to mention, as the Appellate Division did at oral argument, *that Michael H. had nothing to do with any adoption.*

Brief to the Court of Appeals, p. 60, n.46.

answer is a resounding "Yes" for two significant reasons. First, the relationship between Miguel and Louise has been one of long-standing, even if at times turbulent.[5] Indeed, they have an older child, Lauren, now four years old, whom they have raised together even if not always under the same roof. Second, they are husband and wife and have been since but a few months after the birth of their second child, Raquel, the subject of this litigation.

Thus, in every sense of the words they constitute the "traditionally protected family unit" Justice Scalia spoke of in *Michael H.*

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[5] As they have attempted to do throughout this litigation, in this Court Petitioners distort the nature of Respondents' relationship. Their efforts in that regard go so far as to refer to Respondent Louise T. as "Ms. N.". This of course, is done to camouflage Respondents' status as husband and wife, a fact Petitioners' merely note in passing. More disturbing, however, is Petitioners' repeated allegation that the child who is the subject of this litigation was a product of rape. See Pet. at 25, n.3. Rather than have this Court waste its precious time reading a detailed rebuttal of this accusation, Respondents merely note that a *unanimous* Court of Appeals, in a decision authored by its only woman member, never once makes reference to that allegation. We note further that the hearing court, before whom Louise was extensively examined on this issue, failed to mention it in its factual findings.

No less than *Fourteen jurists* have been involved with this case and *not one has questioned Respondent Miguel T.'s fitness as a parent.*

II DECISIONS OF THIS COURT DURING PAST TWENTY YEARS HAVE FIRMLY ESTABLISHED THE PARENTAL DUE PROCESS AND EQUAL PROTECTION RIGHTS OF UNWED FATHERS. THE ORDER SOUGHT TO BE REVIEWED WAS COMPELLED BY THOSE DECISIONS SINCE THE INVALIDATED STATUTE WAS IN CONFLICT THEREWITH AND WITH THE LAW OF OTHER STATES.

In five cases, *Stanley v. Illinois*, 404 U.S. 645 (1972), *Quillon v. Walcott*, 434 U.S. 246 (1978), *Caban v. Mohammed*, 441 U.S. 380 (1979), *Lehr v. Robertson*, 463 U.S. 248 (1983) and *Michael H. v. Gerald D., supra*, this Court has established and reaffirmed the principle that unwed fathers who make reasonable attempts, to the best of their ability, to establish a relationship with their children are entitled to parental rights afforded all other parents, including the right to consent to the adoption of their children. On the basis of that precedent and of decisions of sister states construing it, the New York Court of Appeals held in this case that an unwed father who timely demonstrates a willingness to accept the responsibilities of parenthood should be given the opportunity to do so:

> Consequently, in an adoption proceeding by strangers, an unwed father who has been physically unable to have a full custodial relationship with his newborn child is also entitled to the maximum protection of his relationship, so long as he promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child.

App. at A-12, citing *In Re Adoption of B.G.S.*, 566 So.2d 545 (La. 1990) and *In re Baby Girl Eason*, 257 Ga. 292, 358 S.E.2d 459 (1987).

The Court held further that the opportunity of the unwed father to establish a parental relationship with his child may not be impeded by state-imposed conditions having no rational connection to that goal:

> The living together requirement can easily be used to block the father's rights. But even more significantly, it permits adoption despite the father's prompt objection even when he wishes to form or actually has attempted to form a relationship with the infant that would satisfy the State as substantial, continuous and meaningful by any other standard.
>
> * * *
>
> Although the state plainly has a significant interest in fostering the well-being of the child by insuring swift, permanent placement, the State's objective cannot be constitutionally accomplished at the sacrifice of the father's protected interest by imposing a test so incidentally related to the father-child relationship as this one, directed as it is, principally to the father-mother relationship.

App. at A-15-16 (Citations omitted)

Clearly, there is nothing novel about this conclusion since it was pre-ordained by the decisions of this Court. The Court of Appeals would have been hard-pressed to go any other way.

Consider the facts in *Matter of Baby S.* There, from the moment he learned he was to be a father, Gustavo made every effort, legal and otherwise, to assert his interest in the child. He asserted his paternity even before the child was born, he offered to marry the mother only to have the offer rejected, and, after birth filed a paternity and custody petition. His efforts were initially thwarted by the

mother, her attorney and the adoptive parents, all of whom conspired to deny his existence to the court before which they filed the adoption petition. "In her concluding testimony [the mother] stated 'we hoped he, Gustavo, would not get wind of the whole scheme.' " *Matter of Baby S.*, supra, 535 N.Y.S.2d at 680. When, through sheer persistence, Gustavo learned of the adoption proceeding, he objected, asserting his parental rights.

These facts notwithstanding, according to Petitioner's view and the now-invalidated statute, Gustavo had no right to consent to the adoption of his daughter, and could be ignored in the entire proceeding, for no reason other than the fact that he had not cohabited with the mother for six months prior to the child's surrender.[6] Obviously, the Court of Appeals could not permit such a cruel and unusual result in the face of the decisions from this Court.

CONCLUSION

The Court has no jurisdiction as the order sought to be reviewed is not final within the meaning of 28 U.S.C. Sec. 1257. In any event, Petitioners present for the Court's

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[6] Petitioners suggest that by affording fathers the right to participate in a best-interest hearing, New York's statutory scheme grants all that is required under the Due Process and Equal Protection Clauses of the 14th Amendment. What they fail to advise this Court, however, is that under New York law participation in a best interest hearing affords the father no "substantive right he does not otherwise possess". *Matter of Male F.*, 97 Misc. 2d 505, 411 N.Y.S.2d 982 (1978)

consideration issues that have been decided by this Court over twenty years. The case does not merit the attention of the nation's highest court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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